REPORT
on
POWERS OF ATTORNEY

ONTARIO LAW REFORM COMMISSION

DEPARTMENT OF JUSTICE 1972

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The Ontario Law Reform Commission was established by section 1 of *The Ontario Law Reform Commission Act, 1964* for the purpose of promoting the reform of the law and legal institutions. The Commissioners are:

H. Allan Leal, Q.C., LL.M., LL.D., *Chairman*
Honourable James C. McRuer, S.M., LL.D., D.C.L.
Honourable Richard A. Bell, P.C., Q.C.
W. Gibson Gray, Q.C.
William R. Poole, Q.C.

Edward F. Ryan, LL.B., LL.M., is Counsel to the Commission. The Secretary of the Commission is Miss A. F. Chute, and its offices are located on the 16th Floor at 18 King Street East, Toronto, Ontario, Canada.

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ONTARIO LAW REFORM COMMISSION

To The Honourable Allan F. Lawrence, Q.C.,

Minister of Justice and
Attorney General for Ontario.

Dear Mr. Attorney:

As a result of representations made to us, and pursuant to section 2 (1) (*a*) of *The Ontario Law Reform Commission Act*, R.S.O. 1970, c. 321, the Commission initiated a study concerning certain aspects of the law relating to powers of attorney.

The scope of this Report is limited. It has not attempted a complete review of the law relating to powers of attorney. The Report is chiefly concerned with two specific problems:

A. the effect of the donor's subsequent incapacity on a power of attorney; and

B. the effect of the donor's death.

When we began our work, our principal interest was directed toward the uncertainties faced by those who wish to execute a power of attorney which will continue to be valid notwithstanding the donor's subsequent mental incapacity. As a result of representations made to us during the course of our work, and as a result of our reservations concerning the present law, we decided to include in our study the question of whether or not a power of attorney should survive the death of the donor of the power. We now submit our Report.

PART I

THE PRESENT STATE OF THE LAW

The present state of the law is unsatisfactory.

The Powers of Attorney Act, R.S.O. 1970, c. 357, deals principally with the case where the donor has died.

> 1. Where a power of attorney for the sale or management of real or personal estate, or for any other purpose, provides that it may be exercised in the name and on behalf of the heirs or devisees, executors or administrators of the person executing it, or provides by any form of words that it shall not be revoked by the death of the person executing it, such provision is valid and effectual, subject to such conditions and restrictions, if any, as are therein contained.
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> 2.—(1) Independently of such special provision in a power of attorney, every payment made and every act done under and in pursuance of a power of attorney, or a power, whether in writing or verbal, and whether expressly or impliedly given, or an agency expressly or impliedly created, after the death of the person who gave such power or created such agency, or after he has done some act to avoid the power or agency, are, notwithstanding such death or act, valid as respects every person who is a party to such payment or act, to whom the fact of the death, or of the doing of such act, was not known at the time of such payment or act *bona fide* made or done, and as respects all claiming under such last-mentioned person.
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> (2) Nothing in this section affects the right of any person entitled to the money against the person to whom the payment is made, and the person so entitled has the same remedy against the person to whom the payment is made as he would have had against the person making the payment.

The Act enables a donor to provide expressly for the power to survive his death, but does not enable him to provide expressly that the power will survive his subsequent mental incapacity.

To determine whether or not the subsequent mental incapacity of the donor of a power of attorney revokes the power we must look to the law of agency. In this area there are two principal relevant authorities, *Drew* v. *Nunn*[1] and *Yonge* v. *Toynbee*,[2] both of which merit close study.

In *Drew* v. *Nunn* the defendant, while still sane, authorized his wife to act for him and held her out to the plaintiff, a tradesman, as having

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[1](1879), 4 Q.B.D. 661; [1874-80] All E.R. Rep. 1144; 48 L.J. (Q.B.) 591; 40 L.T. 671; 43 J.P. 541; 27 W.R. 810, C.A.

[2][1910] 1 K.B. 215; [1908-10] All E.R. Rep. 204; 79 L.J. (K.B.) 208; 102 L.T. 57; 26 T.L.R. 211, C.A.

that authority. The husband subsequently became insane, and was placed in a private institution. While he was insane, his wife bought goods on credit from the plaintiff who was ignorant of the defendant's insanity. The defendant recovered and resisted an action to recover the price of the goods supplied to his wife, on the ground that the authority which he gave to his wife was terminated by his subsequent insanity.

Two questions were considered by the Court of Appeal.

1. *Does the insanity of the principal put an end to the authority given to the agent?*

The majority (Brett L.J. and Bramwell L.J.) decided that it did.[3]

> If it is held that such insanity as existed here did not put an end to the agent's authority, then, clearly the plaintiff is entitled to recover upon that ground. But, in my opinion, such insanity does put an end to the agent's authority. . . . I, therefore, think the true ground is that the agent, being a person appointed when the principal could act for himself to act for him, when the principal, according to law, cannot act for himself, the person who represents him ceases to be able to act for him. If that is so, where there is lunacy like that in the present case—lunacy so great that the person who suffers from it has no contracting mind, and cannot contract or do any legal act for himself for want of mind—then, as the principal at law is incapable of doing the act for himself, his agent cannot do it for him. *Such lunacy, therefore, puts an end to the authority of the agent, and if any agent acts for his principal after such lunacy is brought to his knowledge, that agent would be doing a wrongful act,* both to the principal and the person with whom he dealt, and he would be liable to any person with whom he so acted for the principal.[4] [Emphasis added]

> If, therefore, the defendant's wife . . . had acted with anybody to whom her previous authority had not been held out, . . . she would be acting as her husband's agent wrongfully. . . . I should say the contract would be void as against the supposed principal and the agent . . . would himself be liable for misleading an innocent person.

Bramwell L.J. stated his agreement with Brett L.J.'s views, but emphasized that he was not prepared to say every case of insanity would be sufficient to revoke the authority.[5]

> I should think the insanity must be something approaching dementia to do so. If the defendant, for instance, had known that

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[3] [1874-80] All E.R. Rep. 1144 at p. 1146, per Brett L.J.

[4] Here, Brett L.J. seems to indicate that an agent with knowledge of his principal's insanity who continues to act, would be liable. In the result, however, he held the principal liable.

[5] *Ibid.*, at p. 1148.

> his wife was pledging his credit, I do not think that because he was insane he would have ceased to be liable. Where a man has no mind at all, of course he is incapable of contracting; he is like a dead man, he has no contracting intelligence.

Cotton L.J. expressed some doubt. He did not wish to pledge himself to any opinion whether or not the authority could be put an end to until there had been a commission of lunacy.[6]

Brett L.J. gave Cotton L.J.'s judgment, and added the following for himself.[7]

> In argument . . . it was admitted that in fact the defendant was in such a state of lunacy that he could not contract himself. Mere weakness of mind would not bring the case within the rule I have laid down.

There was agreement that the insanity of a principal, *if so great as to render him incapable of contracting for himself*, puts an end to an authority to contract for him previously given to an agent. Only Cotton L.J. would lay down a commission of lunacy as a *sine qua non*.

2. *Who is liable where the authority of the agent has been held out to a third person who had no notice of the principal's insanity?*

The Court held that the principal remains liable for what the agent has done so long as the third party had no notice of the principal's insanity.

In the course of his judgment Brett L.J. said:[8]

> It seems to me that a person who deals with the agent without knowledge of the principal's lunacy has a right so to deal, and that the lunatic is bound by having held out the authority of the agent.
>
> It is difficult to state what are the grounds upon which this principle rests. . . . To my mind the better way of stating the ground is, that it is because of a representation, made by the principal when he was sane and could make it, to an innocent party upon which the latter has a right to act until he knows of the lunacy.
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> . . .
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> . . . It is true that if the principal becomes lunatic he cannot himself give notice to the third person of the agency having ceased,

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[6] *Ibid.*
[7] *Ibid.*
[8] *Ibid.*, at pp. 1146-47

> and he may be an innocent sufferer from the wrongful act of the agent. But so is the other; and it is a principle of law that where it is a question which of two innocent parties shall suffer, that one must suffer who caused the state of things upon which the other has acted.
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> . . .
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> . . . On these grounds, *although the authority was put an end to by the defendant's lunacy, and the agent had no authority to deal with the plaintiff, I nevertheless think that the plaintiff can recover, because representations were made by the defendant while sane to the plaintiff, upon which the plaintiff was entitled to act until he had notice of the lunacy*, and no such notice was given to him. [Emphasis added]

Cheshire and Fifoot comment:[9]

> It is submitted that the decision accords with common sense and with the view that a distinction must be drawn between the *authority* and the *power* of the agents [sic], i.e. between his authority to act for the principal and his power to put his principal in a contractual relationship with third parties. The latter may continue after the former has ceased.

The principle laid down in *Drew* v. *Nunn* concerning the question of liability has been confused by the decision of the English Court of Appeal in *Yonge* v. *Toynbee*. *Yonge* v. *Toynbee* is the case traditionally cited for the proposition that the subsequent insanity of the principal annuls any authority (properly created while the principal was sane), whether or not the agent is aware of the principal's supervening insanity, with the result that *if the agent acts on the power, he acts without authority*.

In *Yonge* v. *Toynbee* the defendant, while sane, instructed his solicitors to defend a threatened action. Before the commencement of the action, the defendant became, and was certified as being, of unsound mind. In ignorance of this fact, the solicitors entered an appearance and took all necessary steps on their client's behalf. When the plaintiff learned of the defendant's insanity he moved to have the appearance and all subsequent proceedings struck out, and sought to hold the solicitors personally liable for costs, on the ground that their authority to act had been terminated by the defendant's insanity. The Court decided in the plaintiff's favour, and applying *Collen* v. *Wright*[10] held the agents liable on the ground that they had impliedly warranted an authority they did not possess.

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[9] Cheshire and Fifoot, *The Law of Contract*, (Seventh Edition, 1969) p. 457.

[10] (1857), 8 E. & B. 647; [1843-60] All E.R. Rep. 146; 27 L.J. (Q.B.) 215; 30 L.T. (O.S.) 209; 4 Jur. (N.S.) 357; 6 W.R. 123. In that case the principle was laid down that a person who asumes to act as an agent does not merely warrant that he honestly believes that he has authority to act for a principal, but warrants absolutely that the authority which he professes to have does in fact exist.

Buckley L.J. stated his view of the law, and what the result in the case before him must, therefore, be.[11]

> . . . the liability of the person who professes to act as agent arises (a) if he has been fraudulent, (b) if he has without fraud untruly represented that he had authority when he had not, and (c) also where he innocently misrepresents that he has authority where the fact is either (1) that he never had authority or (2) that his original authority has ceased by reason of facts of which he has not knowledge or means of knowledge. Such last-mentioned liability arises from the fact that by professing to act as agent he impliedly contracts that he has authority, and *it is immaterial whether he knew of the defect of his authority or not.* [Emphasis added]

Buckley L.J. found that the solicitors originally had authority, but that that authority had ceased by reason of their client's unsoundness of mind, and in acting for him they put the plaintiff to costs, which costs were incurred on the faith of their representation that they had authority to act for the defendant.

Swinfen Eady J. concurred, as did Vaughan Williams L.J. although the latter did so "reluctantly and not without doubt".[12]

Yonge v. *Toynbee* is cited in the 19th edition of Anson's *Law of Contract*[13] as the basis for the "rule" that the insanity of the principal determines the authority of an agent, whether or not the agent is aware of it. The rule seems to be widely accepted. This may, however, lead to a curious result.[14]

The decision in *Yonge* v. *Toynbee* is difficult to reconcile with that in *Drew* v. *Nunn* on the question of whether the principal or the agent is to be held liable.[15] *Drew* v. *Nunn* was not mentioned in the judgments in *Yonge* v. *Toynbee* but was cited by the defendant's counsel.

The two cases are *ad idem* on the question of whether or not the supervening incapacity of the principal terminates the authority of the agent. What is not clear is whether the principal or the agent is liable if the agent acts on his invalid authority. *Drew* v. *Nunn* holds the principal liable so long as the third party had no notice of the principal's insanity. *Yonge* v. *Toynbee* holds the agent liable whether or not the agent had knowledge of the principal's insanity.

Cheshire and Fifoot attempt to distinguish *Yonge* v. *Toynbee* on the facts.[16]

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[11] [1910] 1 K.B. 215 at p. 227.
[12] *Ibid.*, at p. 234.
[13] (19th ed. 1945) at p. 418. In the 21st edition (1959), the editor states that the effect of the insanity of the principal is "a matter of some difficulty". He cites and discusses both *Yonge* v. *Toynbee* and *Drew* v. *Nunn*.
[14] See Anson's *Law of Contract* (19th ed.) at p. 418.
[15] See Cheshire and Fifoot *supra*, at p. 458.
[16] *Ibid.*

> First, in the action as framed, the principal could not possibly have been held liable since a person under a disability may not defend any proceedings except by his guardian *ad litem* [R.S.C. Ord. 80, r. 2 (I); rep. Ord. 16 B. r. 2 (I)]. Secondly, and this carried great weight with Swinfen Eady J. the agent was a solicitor, an officer of the court upon whom the judiciary and other parties to litigation place great reliance. Much confusion would ensue "if a solicitor were not to be under any liability to the opposite party for continuing to act without authority in cases where he originally possessed one."[17]

It is interesting that in *Drew* v. *Nunn* the agent was a married woman, and Brett L.J. points out that as such, it would be difficult to make her liable, although admittedly in the paragraph of his judgment in which he mentions the fact, he is speaking of the situation where she had not been held out as an agent.[18]

> If, therefore, the defendant's wife . . . had acted with anybody to whom her previous authority had not been held out, I should say she would be acting as her husband's agent wrongfully, although being a married woman it would be difficult to make her liable. I should say the contract would be void as against the supposed principal, and the agent in such as case would himself be liable for misleading an innocent person.

G. H. L. Fridman in *The Law of Agency*, states his view of the law.[19]

> . . . the relationship [the agency relationship] may be affected by the subsequent insanity of either the principal or agent, for such insanity will determine the relationship on the ground that an insane person cannot validly contract so as to appoint or act as an agent.

He cites both *Drew* v. *Nunn* and *Yonge* v. *Toynbee* as his authorities.

In Ontario, while the assumption in practice is that the "rule" in *Yonge* v. *Toynbee* governs, there are those who place some reliance on the case of *Kerr* v. *Town of Petrolia*,[20] and the remarks made by Mulock C.J. Ex.

Answering the contention of the defendant corporation, that at the time of the execution of the lease in question, the principal, John Kerr, was of unsound mind, and that, therefore, the power of attorney held by his nephew (who executed the lease under the power) was revoked,

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[17] [1910] 1 K.B. 215 at p. 233 per Swinfen Eady J. This reasoning did not impress Buckley, L. J., *ibid.*, at pp. 228-9.
[18] [1874-80] All E.R. Rep. at p. 1146.
[19] Second Edition, 1966, at p. 280.
[20] (1921) 51 O.L.R. 74.

Mulock C.J. Ex., while finding as a matter of fact that the principal was not insane, and that the lease was binding on the defendant, made the following comments:[21]

> As already stated, John Kerr was in his right mind when he executed the power of attorney. If, thereafter, and before the lease was executed, he became insane, then the questions are: what effect, if any, had such subsequent insanity upon [the agent's] previous authority to execute the lease, and upon the lease itself?
>
> Some text writers state that the insanity of the principal *ipso facto* revokes the agency, but the cases do not support such an unqualified proposition: for example, in the leading case of *Drew* v. *Nunn* . . . it was held that a lunatic was liable on contracts made by his agent with third persons who were ignorant of the fact of the principal's lunacy, but to whom the lunatic when sane had represented that the agent had authority to contract for him; thus in such a case the principal's insanity does not revoke the agency. . . .
>
> In the 15th edition of Anson on Contract, p. 433, reference is made to *Drew* v. *Nunn* . . . in these words: "It seems no longer open to doubt since the case of *Yonge* v. *Toynbee* . . . that insanity annuls an authority properly created while the principal was sane". In that case solicitors were instructed by a client to conduct his defence in an anticipated action, but before action begun the client became and was certified as of unsound mind. The solicitors, in ignorance of the client's insanity, entered a defence, to which the plaintiff replied. Subsequently the plaintiff's solicitors, having learned of the defendant's insanity, moved in Chambers for an order setting aside the defence and all subsequent proceedings and ordering the solicitors who had purported to represent the defendant to pay the costs, and the learned Master set aside the proceedings but refused to order the solicitors to pay the plaintiff's costs. The only appeal from this order was in respect to the Master's refusal to award costs against the solicitors. The Court of Appeal held the solicitors liable for costs, on the ground that, in defending, they had impliedly warranted that they possessed the necessary authority, which, in fact, they had not, and had thereby to their prejudice misled the plaintiffs. But, in thus holding the agents liable for breach of warranty, the Court did not decide that what they had done was void. The Court was not called upon to consider and expressed no opinion in regard to that portion of the Master's order which set aside the proceedings. That portion of his order is, I think, contrary to the law as laid down in *Drew* v. *Nunn*, . . . and cannot be accepted as supporting the proposition that mere insanity for all purposes annuls an agent's authority created when the principal was sane; and I am of opinion that insanity alone (if such existed) of John Kerr [the principal] at the time of the execution of

[21] *Ibid.*, *at* pp. 80-81.

> the lease did not unqualifiedly revoke Kenneth Campbell Kerr's [the agent's] authority.

These remarks by Mulock C.J. Ex. have been relied on by some for the proposition that the subsequent incapacity of the donor does not revoke the power. The Canadian Encyclopaedic Digest, in a footnote under the heading "Revocability of Power of Attorney", states the proposition and cites the *Kerr* case as the authority.[22] Under the heading "Insanity of Principal" there is the following statement:[23] "Insanity of the principal does not *ipso facto* revoke the agency". Again, the *Kerr* case is cited as the authority. The Commission is doubtful about relying on the *Kerr* case as an authority for such a proposition. There are clear statements in both *Drew* v. *Nunn* and *Yonge* v. *Toynbee* that insanity does put an end to the agent's authority. The cases differ only on who should be liable to a third party, the principal or the agent. Since Mulock C.J. Ex. found the principal sane in the *Kerr* case, his remarks on the question of whether or not insanity terminates the agent's authority are *obiter*.

Our attention has also been drawn to the case of *Re Parks, Canada Permanent Trust Co.* v. *Parks*,[24] a New Brunswick case,[25] in which it was held that the authority of an agent is revoked as between principal and agent, by the supervening mental incompetency of the principal, at least where, as in the case before the Court, the mental condition of the principal is completely irrational and certifiable. However, third parties are not bound by the revocation unless they have knowledge, either actual or constructive, of the principal's condition or are aware of circumstances relating thereto which should put them upon their inquiry.

In the course of his judgment, Bridges J. reviewed the "very few authorities"[26] on the question of the termination of a contract of agency by the insanity of a principal. These were, of course, *Drew* v. *Nunn* and *Yonge* v. *Toynbee*. The learned judge pointed out the difficulty expressed by legal writers in reconciling the two cases, but adopted the statement in 1 Hals., 3rd ed. p. 244 (where both cases were cited) as, in his view, a correct statement of the law.[27]

> If the principal becomes a person of unsound mind, the agency as between the principal and agent is determined, but is not *ipso facto* revoked with regard to a third person dealing with the agent without knowledge of the condition of the principal.

He then went on to find the principal "of unsound mind to such a degree that she would have been declared a mentally incompetent person

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[22] 1 C.E.D. (Ont. 2nd) p. 148. "A power of attorney does not become revoked nor the right to act upon it suspended by the fact that the person who has executed it subsequently becomes insane."

[23] *Ibid.*, at p. 206.

[24] (1957), 8 D.L.R. (2d) 155.

[25] New Brunswick Supreme Court, Appeal Division.

[26] (1957), 8 D.L.R. (2d) 155 at pp. 160-161.

[27] *Ibid.*, at p. 161.

had an application been made . . .",[28] and that her agent had acted improperly in making payments from her estate because, as between the two of them, the power of attorney had been revoked, through her mental incompetency.

It is apparent that the law is in an unsatisfactory state. In the late nineteenth and early twentieth century when the rule was formulated that the subsequent insanity of the donor revoked the agent's authority, there was a clear-cut test of insanity, and that was evidenced by the person being certified. Today, the question of whether or not a person is *compos mentis* is a much more difficult one to answer. As a result, considerable practical difficulties are created for attorneys. These can and should be eliminated.

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[28] *Ibid.*, at pp. 161-162.

PART II

THE WORK OF THE ENGLISH LAW COMMISSION

The English Law Commission last year published a report on Powers of Attorney[29] which has led to the *Powers of Attorney Act 1971*. The Report included a consideration of the question of the incapacity of the donor of the power. It began by stating the Commission's view of the law:[30]

> A power of attorney cannot be effectively granted unless the donor is capable of understanding what he is doing *and the subsequent incapacity of the donor operates to revoke the power*. Some protection to the donee of the power and to third parties is provided by [certain sections of the *Law of Property Act 1925* and of the *Trustee Act 1925*] . . . ; *nevertheless, if there is incapacity, a person who continues to act under any authority given prior to or during incapacity, or any bank or other individual or company which permits any dealing with knowledge of that incapacity, incurs considerable risks.* [Emphasis added]

The Commission went on to say that, strictly speaking, in such circumstances it is necessary to take immediate steps to appoint a receiver under the Court of Protection. They recognized, however, that such a step formally acknowledging mental incapacity is generally regarded as distasteful both by the patient and his relations. It also involves expense and takes time.

In the view of the English Commission it would "undoubtedly be convenient" if it were possible to grant a power under which the donee would be entitled to continue to handle the donor's affairs notwithstanding the latter's incapacity. They had expressed the same opinion in a Working Paper circulated prior to the issuing of the Report, and had been confirmed in their view by the responses they received. Chief among their supporters were the Council of the Law Society and the Holborn Law Society, both of which submitted detailed proposals for a special type of power of attorney which might validly be operated in such circumstances.[31]

The Commission took the view, however, that the matter was not one which could properly be dealt with in isolation from a complete review of the present procedure for dealing with the property of persons of unsound mind and decided to make no recommendation on whether or not the subsequent insanity of the donor of a power of attorney should revoke the power until they had made such a study.

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[29] Law Com. No. 30; Cmnd. 4473.
[30] *Ibid.*, para 25.
[31] See below for a discussion of these proposals.

Recognizing the need to protect an attorney who acts in pursuance of a power of attorney, and finding the protection afforded by the *Law of Property Act 1925* and the *Trustee Act 1925* unsatisfactory, the Commission recommended[32] that

> An attorney who acts in pursuance of any power of attorney at a time when it has been revoked shall not by reason of the revocation incur any liability to the donor of the power or to a third party for breach of an implied warranty of authority, if at that time he did not know that the donor had revoked the power, or that an event had occurred which caused it to be revoked.

Legislative expression was given to this recommendation in the *Powers of Attorney Act 1971*, section 5.

> 5.—(1) A donee of a power of attorney who acts in pursuance of the power at a time when it has been revoked shall not, by reason of the revocation, incur any liability (either to the donor or to any other person) if at that time he did not know that the power had been revoked.
>
> (2) Where a power of attorney has been revoked and a person, without knowledge of the revocation, deals with the donee of the power, the transaction between them shall, in favour of that person, be as valid as if the power had then been in existence.
>
> (3) Where the power is expressed in the instrument creating it to be irrevocable and to be given by way of security then, unless the person dealing with the donee knows that it was not in fact given by way of security, he shall be entitled to assume that the power is incapable of revocation except by the donor acting with the consent of the donee and shall accordingly be treated for the purposes of subsection (2) of this section as having knowledge of the revocation only if he knows that it has been revoked in that manner.
>
> (4) Where the interest of a purchaser depends on whether a transaction between the donee of a power of attorney and another person was valid by virtue of subsection (2) of this section, it shall be conclusively presumed in favour of the purchaser that that person did not at the material time know of the revocation of the power if—
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> (a) the transaction between that person and the donee was completed within twelve months of the date on which the power came into operation; or
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> (b) that person makes a statutory declaration, before or within three months after the completion of the purchase, that he did not at the material time know of the revocation of the power.

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[32] Law Com. No. 30, para 32 (e).

(5) Without prejudice to subsection (3) of this section, for the purposes of this section knowledge of the revocation of a power of attorney includes knowledge of the occurrence of any event (such as the death of the donor) which has the effect of revoking the power.

(6) In this section "purchaser" and "purchase" have the meanings specified in section 205 (1) of the Law of Property Act 1925.

(7) This section applies whenever the power of attorney was created but only to acts and transactions after the commencement of this Act.

Subsection (1) implements the Law Commission's recommendation in para. 32 (e). If the donee acts in ignorance that the power has been effectively revoked he incurs no liability by reason of the revocation, either to the donor or to a third party. But, by virtue of subsection (5) he is deemed to know that the power has been revoked if he knows of an event, such as the death of the donor, which has the effect of revoking it.

The New Law Journal expressed some disappointment with the Law Commission's decision to postpone any recommendation on the effect of the donor's subsequent incapacity on the donee's authority to act.[33] It pointed out that just when the donor of the power most needs his "*alter ego* to act for him", that is, when he ceases through decreasing mental capacity, because of senility or illness, to be capable of acting for himself, both *de facto* and *de jure*, "that is precisely the moment at which the law decrees that the power of attorney is revoked", so that the donee of the power incurs considerable risks if he continues to act under it. While, strictly speaking, it is necessary in such circumstances to take steps to have a receiver appointed under the Court of Protection, that is "a course that scarcely anyone follows" because it is a "distressing and distasteful" one and "moreover, an expensive and time-consuming one". Therefore attorneys continue to act "without legal authority or effective safeguards".[34]

Going on to consider the Law Commission's decision, the New Law Journal, while stating it did not quarrel in the slightest with the view of the Commission that a comprehensive review should be undertaken of the entire law relating to the property of the mentally ill, made the following comments:[35]

It is however difficult to see how such a comprehensive review would be compromised in any way, if the particular nonsense to which we have referred above had now been remedied by an appropriate provision in the Powers of Attorney Bill appended to the Commission's report. Except that a person under disability through mental illness cannot manage his affairs for a different reason from a person who leaves the jurisdiction, both are in the same predicament in

[33](1970), 120 N.L.J. 889.
[34]*Ibid.*
[35]*Ibid.*

needing a legal *alter ego*; it would however be considered a very extraordinary situation if a man who had given a power of attorney to his wife, in anticipation of his going to foreign parts for a long period, found that at the moment at which his plane left English soil, his wife ceased to have power lawfully to act for him and would if she did so "incur considerable risks". That is, however, in effect very much the position in relation to the mentally incapacitated.

A specific immediate remedy for that situation would no more have exemplified the evils of piecemeal reform than the specific remedy the Law Commission propose to meet the almost certainly far less common case where a person is *physically* incapable of giving a power of attorney because he cannot execute one (if, for example, he is in an iron lung). He is to be able to do so under a provision included in the Law Commission's Powers of Attorney Bill. . . .

The New Law Journal concluded by stating that[36]

. . . the urgent needs of the public in this matter appear to have been put on the long finger of what Fontaine called "les longs espoirs et les vastes pensées".

Submissions Made to The English Law Commission By

(a) The Holborn Law Society

(b) The Council of The Law Society

(a) The Holborn Law Society

The Holborn Law Society urged that the law regarding the effect of the incapacity of a donor of a power of attorney be considered as soon as possible, since in their view, the present law was extremely unsatisfactory.

. . . In the days when the rule was formulated that supervening insanity of the principal revoked the authority of the agent, whether he knew about it or not, there was a clear-cut test of insanity. Either a man was certified or he was not certified. If he was certified he was insane. If he was not certified, he was sane. The Mental Health Act has abolished all that and the question whether a man is sane or insane is one which many psychiatrists, let alone laymen, are unable to answer. This creates considerable practical difficulties for persons, including solicitors, whose profession is to act as agents. The consequences of acting without authority can be very serious

[36] *Ibid.*

for the agent, as was illustrated in *Yonge* v. *Toynbee*, but the question whether the authority has determined is much more difficult to answer now than it was in 1910.

A very large number of the cases which nowadays end up in the Court of Protection are those of elderly persons who give General Powers of Attorney when they realise that their memories and powers of concentration are beginning to fail, but when they are still unquestionably sane. As the years go by, they slowly and imperceptibly deteriorate, but there is no given moment of time at which it can be said that they cross the borderline from capacity to incapacity. That puts the attorney in an extremely difficult position. No one wants unnecessarily to submit to the requirements of the Court of Protection which, though liberalised in recent years, are still unavoidably detailed and expensive. On the other hand the attorney may be in very serious trouble if he goes on acting too long. One possible solution would be to enact that Powers of Attorney shall not be revoked only by reason of the supervening insanity of the donor, but shall not be valid for more than a specified limited period from their execution unless reexecuted, for a further like period, in the presence of a registered medical practitioner who certifies in the attestation clause, that the donor is not incapable by reason of mental disorder as defined in the Mental Health Act 1959 of managing and administering his property and affairs.

They did not, however, agree that death should cease to revoke a revocable power of attorney, and rejected the position which prevails in some legal systems whereby a power of attorney can authorize the donee to administer the affairs of the donor after the latter's death. The Holborn Law Society, then, would disagree with section 1 of the Ontario Act.

(b) The Council of The Law Society

The Council of the Law Society did not feel that the present situation was a desirable one,

> . . . since it results in the law being ignored on a large scale and puts attorneys who are acting quite honestly, and reasonably in the best interests of their principals under a serious risk of liability either to third parties or to the principals themselves.

They submitted, therefore, that there ought to be some means provided of remedying the situation, and suggested the introduction of a special type of power of attorney, capable of surviving such incapacity of the donor as would normally operate to revoke a power, subject, however, to certain safeguards and limitations:

(a) the donor must be in full possession of his faculties and understand what he is doing when granting the power;

(b) the donor must actually intend that the power should be capable of continuing in force after he becomes incapable of managing his affairs;

(c) there must be some limitation on the persons who can be appointed as attorneys under this provision, in order to ensure their reliability and to protect those who may be unfitted for the responsibilities from being pressed to undertake them;

(d) there must be some limit of time on the continuance of the power during the donor's incapacity, since the proposal is primarily intended to cover comparatively short periods such as the period of senility or incapacitating illness which often precedes death, and not so much cases where a person at an early age becomes and remains mentally ill, either permanently or for a long period, where it is entirely right and proper that the Court of Protection should assume jurisdiction.

These conditions were considered in greater detail.

(a) – It is an essential element in the proposal that the donor should be fully capable when granting the power. It is therefore recommended that the execution of a power of this sort should require to be witnessed by a medical practitioner, who should have to make a statutory declaration to the effect that the donor was of sound mind and understanding at the time of execution and that he clearly understood the nature and effect of what he was signing. So that third parties acting on such a power would not need to enquire into the fulfilment of this requirement, it is suggested that the statutory declaration by the medical practitioner should be incorporated in or annexed to the power.

(b) – It is also considered that the intention of the donor is an essential element in this proposal. Cases where the supervening incapacity has not been contemplated will therefore be excluded. This is inevitable if the proposal is to retain its basis in the free choice of the donor, and we think it must. We therefore recommend that the power should be required to contain an express statement that it is the donor's intention that, even if mental incapacity should supervene, the power is not to be thereby revoked.

(c) – It is most important to ensure that a power of attorney of this sort should be exercised both competently and honestly in the interests of the donor. We have studied various possible safe-

guards and, after careful consideration, we have come to the conclusion that the best precaution is to require that there must be not less than two joint attorneys, at least *one* of whom is not a member of the donor's family, and at least one of whom must be, and remain, a member of a professional body or an organization which is, for practical purposes, in a position to guarantee his honesty. With reference to this last requirement, we envisage that the enabling statute would provide in general terms that at least one of the attorneys should fulfil certain requirements to be specified by Order of the Lord Chancellor, and that the Lord Chancellor would then make an Order specifying certain approved classes which it is suggested should include both trust corporations and solicitors holding a practising certificate. It would be a matter for consideration whether any other class of persons should be included but if an important new step of the kind recommended is taken by Parliament it would seem best to proceed a little cautiously, at least in the early stages. With regard to the requirement that at least one of the attorneys should not be a member of the donor's family, the limits of the family for this purpose would need to be defined, bearing in mind questions of influence over the donor and potential benefit from his estate, but the exact definition is not a matter which need be discussed in detail at this stage. It is recommended that the two requirements should be taken separately, so that, for example, a solicitor who is also a member of the donor's family need not be joined with another solicitor or trust corporation but only with one other attorney who is not a member of the family. It may be desirable to make special provision for cases where any of the joint attorneys dies, ceases to be capable of acting or ceases to be qualified as above. However this is a point of detail which can be left for further consideration later.

(d) – The need for a time limit on the continuance of the power during incapacity is recognised, since it would seem wrong to bind a donor indefinitely during his incapacity to a choice made by him when circumstances might have been very different. The selection of a suitable maximum period is not easy, but on the whole we consider that it should be a period of not more than *five years* from the date of the creation of the power, the period to be specified in the document. Anything substantially less than this would impair the value of the provision to such an extent as to make its introduction almost pointless. The period needs to be long enough to cover the usual time taken for the decline of an old person's faculties through senility or incapacitating illness to his death. Admittedly the process can in some cases last a good deal longer than five years, but a period substantially exceeding that time is one in which so many changes of circumstances may take place that the original choice of the donor begins to lose its validity and the

arguments for applying to the Court of Protection for the appointment of a Receiver become much stronger.

The Law Society concluded by recommending that a power of attorney which complies with the requirements stated above should not be revoked by the supervening incapacity of the donor during the period stated in the power, although it should be revoked by any other circumstances, such as death or bankruptcy, and it should also be revocable by the donor while he is capable of doing so.

With regard to the protection of third parties, the Law Society recommended that they should be entitled to rely on the power during the whole of the stated period. Unless it appears on the face of the power that the necessary requirements have not been complied with, *bona fide* third parties should be entitled to rely on the power and to accept the statements in it without further investigation.

PART III

THE COMMISSION'S RECOMMENDATIONS FOR REFORM OF THE LAW IN ONTARIO

Introduction

We have sought the views of those concerned about the efficacy of our law relating to powers of attorney, including all banks and trust companies operating in Ontario, as well as The Trust Companies Association of Canada. Their unanimous view was that the law needs clarification, although there was some division of opinion as to what direction its reform should take. We found, however, a majority opinion in favour of allowing the donor of a power of attorney to provide expressly for the continuance of the power in the event of his subsequent incapacity. A good many of those who have expressed their views on this matter feel this is of greater practical importance, and, indeed, is more desirable than allowing the power to survive the donor's death. There is a very great practical need to provide for the continuing management of the affairs of a person whose mental faculties have become impaired, either through old age, or disease, without resort to a declaration of mental incompetency, which many people find distasteful, and which all agree involves expense and delay. In the case of death the need is not as great, since there will normally be an executor or an administrator with the authority necessary to act on behalf of the deceased's estate.

Effect of The Donor's Subsequent Incapacity on a Validly Executed Power of Attorney

The typical situation likely to give rise to the need for exercising a power of attorney during the donor's incapacity will be that of an elderly member of the family, who, because of senility, or disease, is unable to continue managing his or her own affairs.[37] In these circumstances, attorneys, usually relatives, continue to act on behalf of the donor of the power, even though they may be doing so at their peril. It is distasteful for many people to have a parent, or grandparent, or aunt or uncle, or even a close friend declared mentally incompetent, to say nothing of the expense and delay involved in such a procedure. Allowing a donor of a power of attorney to provide expressly for its survival even after his supervening incapacity is a simple and expedient method

[37] We are not concerned here with the declared mental incompetent for whom a committee has been appointed, or with those confined to psychiatric institutions. See the provisions of *The Mental Incompetency Act*, R.S.O. 1970, c. 271 for procedures to manage the affairs of a mental incompetent.

of solving the problem.[38] There are those who argue that such a reform of our law would leave the way open to grave abuse. This argument loses what merit it may have if safeguards are built into our Act, to minimize the opportunities for improper use of a power in these circumstances.

It seems wrong for our law to decree that at precisely the moment a person most needs his *alter ego*, his attorney, to act for him, because he himself is incapable of managing his affairs, his attorney cannot properly do so, since his power has been revoked by law.

We accordingly recommend that *The Powers of Attorney Act*, R.S.O. 1970, c. 357, be repealed and that there be enacted a Powers of Attorney Act which will allow a donor of a power of attorney to provide expressly for the power to survive his subsequent incapacity, subject to certain conditions. By making such a recommendation we recognize the need to remedy the absurd situation which exists at present wherein attorneys often continue to act at their peril, ignoring the generally accepted law. They are put in this position because the affairs of the donor must be looked after, and because an application to the court for a declaration of mental incapacity, with all that that entails and implies, is distasteful.

Safeguards against abuse of the power, however, must be written into the Act. For this reason we recommend that certain conditions or requirements be met if the donor wishes to provide for the survival of the power in the event of his subsequent incapacity. In our view, these requirements will ensure (as far as legislation can ever ensure) the minimum danger of misuse of the power.

THE CONDITIONS

Obviously, the basic condition for the validity of this, or indeed of any other power of attorney, is that the donor must be in full possession of his faculties when he executes the power. We realize that this is a matter of common knowledge and general acceptance, but nevertheless wish to emphasize its application in these special circumstances.

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[38] In his Royal Commission Inquiry into Civil Rights, the Honourable J. C. McRuer pointed out that our system of administering the estates of mentally incompetent persons was deficient in that it lacked an informal and inexpensive procedure for administering small estates. He urged that such a procedure be devised, and recommended that a form of power of attorney should be authorized by statute which would continue to be valid notwithstanding the donor's subsequent incapacity.

> "Simple machinery could be devised, whereby . . . a person could be authorized to act as attorney for the incompetent without setting up the elaborate machinery of a legal committee. It is not the function of this Commission to work out a procedure in detail, but steps should be taken to give legal authority to a useful practice that is now carried on on a very wide scale, but with questionable legality."

See The Royal Commission Inquiry into Civil Rights, Report No. 1, Volume 3, pp. 1251-1254.

Consideration was given to whether the execution of the power of attorney should be witnessed by a medical practitioner, who would then make a statutory declaration to the effect that the donor was of sound mind and that he appreciated the nature and effect of what he was signing. We have rejected this suggestion because we believe it would introduce an unnecessary complexity. We are convinced that it will be sufficient to rely on the ordinary onus of proof which, of course, will fall on the person attacking the power.

1. We recommend that it be made clear in the Act that the donor must expressly state in the power of attorney that he intends the power to survive and be valid if mental incapacity should supervene, and that the form of the power of attorney itself should contain a clear statement that the power will not be revoked by the donor's subsequent incapacity.

This requirement is necessary in order that there will be evidence on the face of the document that the donor has considered the possibility of his becoming mentally incapacitated and that he wishes the attorney or attorneys named in the power to be able to continue to manage his affairs should he no longer be able to do so. Too, by including a statement of this kind, one ensures that the donor's attention is drawn to the fact that the power will continue to be valid should mental incapacity supervene.

2. As a precautionary measure, to ensure, as far as possible, competency and honesty in the exercise of a power of attorney in these special circumstances, we recommend:

(a) that the power of attorney be executed in the presence of at least one witness, who shall be someone other than the donee or the spouse of the donee;

(b) (i) that the attorney be required to file a notarial copy of the power of attorney in the office of the registrar of the surrogate court of the county or district where the donor or the donee resides, not later than fifteen days after the attorney first learns that the donor has become incapacitated;

(ii) that the registrar of the surrogate court transmit a notice of the filing of the power of attorney to the Registrar of the Supreme Court by registered mail;

(iii) that (subject to paragraph iv) if the attorney fails to file a copy of the power of attorney, the power cannot be exercised validly subsequent to the donor's incapacity;

(iv) that if the attorney fails to file a copy of the power of attorney, provision be made for an application to the surrogate court for an order validating the exercise of the power of attorney in the period subsequent to incapacity

notwithstanding the attorney's failure to file, and directing the attorney to file both a copy of the power of attorney and the order in the office of the surrogate court not later than fifteen days after the date of the order;

(c) that provision be made for interested parties to apply to the surrogate court for an order that the attorney be directed to pass his accounts;

(d) that the Public Trustee be empowered to apply to the surrogate court on behalf of interested parties for an order directing the attorney to pass his accounts if a complaint is made to him.

The requirement that attorneys must file a notarial copy of the power with the surrogate court office performs a useful function. It puts the power of attorney on public record, and, more importantly, publicly identifies the attorney. This not only protects the attorney, but also enables interested parties to inform themselves of the existence of the power.

While we cannot stress too strongly the importance of filing a copy of the power of attorney, we are reluctant to see the power irrevocably invalidated by failure to file. The chief reason for our reluctance is our desire not to frustrate the expressed intention of the donor. In addition, there may frequently be some difficulty in establishing the precise time at which the donor becomes incapacitated. We have recommended, therefore, that the Court have power to grant relief from the filing requirement.

We are firmly of the opinion that interested parties should be provided with the opportunity to ask for an accounting. The fact that the attorney can be called upon to give an accounting acts as a salutary check on the exercise of the power.

We do not believe that the accounting procedure we have recommended will result in more complexity and expense than is desirable. The benefit of the undoubted safeguard it presents far outweighs any such considerations. It is much simpler, less expensive, and more expedient than having to apply to the Court for a declaration of mental incompetency.

3. In the event the attorney dies, or himself becomes incapable of acting subsequent to the donor becoming incapacitated, it should be possible for interested parties to apply to the Court to have another attorney substituted for the attorney named in the power. Once the donor has become incompetent, so that it is no longer open to him to name a substitute attorney, an application for a Court approved substitute becomes necessary. We recommend, therefore, that provision be made for interested parties to apply to the surrogate court to have a

person other than the named attorney substituted for the named attorney. We further recommend that the Public Trustee be empowered to make an application to the Court on behalf of interested parties for a substitute attorney, if a request is made to him. Of course, should the attorney die, or cease to be able to act for any reason prior to the donor becoming incapacitated, the donor may name another attorney.

4. We recommend that provision be made for the attorney himself to apply to the Court to be relieved of his authority to act as attorney, and to have another attorney substituted. We believe this is desirable since there may be circumstances in which the attorney will be unwilling or unable to continue to act for some reason such as a prolonged absence from the jurisdiction, at a time when the donor is incapable of naming another attorney. To guard against abuse of this privilege, and to ensure that all interested parties will have an opportunity to be heard, we recommend that the attorney must give notice of his intention to make such an application to the Public Trustee, and to all interested parties.

5. We recommend that the power should continue to be valid only so long as there has been no declaration of mental incapacity. Should an application for such a declaration be made, and approved, and a committee appointed, then the power should cease to be valid.

We make this recommendation because our sole concern is to provide for the valid management of the affairs of a person whose mental faculties are impaired, but who has not been declared a mental incompetent, or mentally incapable under *The Mental Incompetency Act*.[39]

6. We recommend that it be made clear in the Act that the donor may revoke the power at any time prior to his becoming incapacitated, and may also revoke the power if and when he recovers from his incapacity.

By making this recommendation we emphasize that a power of attorney given in these special circumstances may be revoked.

7. We do not believe that it should be possible for persons to contract out of or waive the provisions of the Act if they wish the power of attorney to survive incapacity. We recommend, therefore, that the Act should apply in all cases where a donor wishes to provide for the validity of the power during his incapacity, notwithstanding any agreement or waiver to the contrary and that the Act should include a section so stating.

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[39] R.S.O. 1970, c. 271.

Power of the Court to Appoint an Attorney for Specific Purposes

There is a need, in our view, to give the Court power to appoint an attorney for specific purposes. We accordingly recommend that the surrogate court on an application being made to it, should in proper circumstances have the power to appoint an attorney to act on behalf of the person who is incapacitated, for limited and specific purposes, on such terms as may be set out in the order.

Our aim has been to provide a simple and inexpensive method of managing the affairs of a person who is incapacitated by age or infirmity. We believe our recommendations achieve this goal.

Effect of the Donor's Death on a Validly Executed Power of Attorney

Section 1 of *The Powers of Attorney Act* allows a donor of a power of attorney to provide expressly that the power will not be revoked by his death. Serious doubts have been expressed about the necessity and desirability of allowing the power to survive the death of the donor.

Certainly, section 1 has very little application where the donor dies testate, having appointed an executor. All the property, both real and personal, devolves to and becomes vested in the executor as a trustee for the persons beneficially entitled.[40] Since the executor takes his authority from the will, and since the will speaks from death, the holder of a power of attorney will have no further control over any aspect of the deceased's estate.

In the case of the donor dying intestate, presumably the attorney would be able to act under it until such time as an administrator is appointed, since an administrator derives his authority solely under his grant and letters of administration are not retroactive as are letters probate.

We seriously doubt, however, whether anyone having knowledge of the donor's death would be prepared to deal with the attorney in such circumstances, because of the necessity of obtaining releases for various assets. Such protection as is afforded by section 2 of *The Powers of Attorney Act*, is limited to cases where there is no knowledge of the death of the donor.

Once the attorney becomes aware of the donor's death, we feel that the executor or the administrator is the proper person to act on behalf of the donor's estate. Complexities are reduced if the executor or the administrator is the sole person with authority to act.

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[40] See *The Devolution of Estates Act*, R.S.O. 1970, c. 129, s. 2.

We see no practical necessity for a power of attorney continuing to be valid following the donor's death. Where an executor is named he will have the necessary authority to act on the testator's behalf. Even if the donor dies intestate there is no immediate urgency. An administrator can be appointed. The donor's family will not be left without funds in either case, since the bank may now pay out $2,500 without any Succession Duty consent[41] and insurance companies can make an immediate payment under a policy of up to $11,500 to a spouse–or $2,500 to any other person.[42]

Accordingly, we recommend that a donor of a power of attorney should not be able to provide expressly for the survival of the power subsequent to his death.

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[41] *The Succession Duty Act*, R.S.O. 1970, c. 449, s. 10 (5).
[42] *Ibid.*, s. 10 (3).

PART IV

THE FORM OF THE POWER OF ATTORNEY

The usual stationer's forms of a general power of attorney are not satisfactory. They are unintelligible to a layman, and even many experienced solicitors encounter difficulty with them. It is desirable in our view to encourage both simplicity and, as far as is possible, standardization in the form of powers of attorney under the Act. Our recommendation is, therefore, that there be a simple form which may be used and that this form be included in The Powers of Attorney Act.

To avoid uncertainty about the scope of the authority given by the power, we recommend that a section be included in the Act which will set out precisely what authority the attorney possesses. In our view, a power in the statutory form should authorize the attorney to do on behalf of the donor, anything which the donor can lawfully do by an attorney. This is a more effective way of clarifying the attorney's authority than by having the power itself contain a long list of specific clauses which not only can never be all-encompassing, but which are unnecessarily confusing. It grants the widest possible authority, but in the simplest possible way.

We also recommend that the form itself include a reference to The Powers of Attorney Act, since it is to that Act that persons must look to determine the authority conferred by the power.

The Commission has studied the Form contained in Schedule I of the United Kingdom's *Powers of Attorney Act* 1971. We agree with it in principle and recommend a similar form for the Ontario Act. For our purposes, however, two additions are required. Since we have recommended that a validly given power should survive the subsequent incapacity of its donor, and have further recommended that in order for it to survive, there must be an express statement of the donor's intention that it will survive his supervening incapacity, we now recommend that the Form contain a statement of that intention. The donor, of course, is free to exclude such a statement if he does not wish the power to survive in those circumstances. In view of the importance we attach to the filing requirement, we further recommend that the Form contain a reference to the necessity for filing.

The Commission recommends the following form of power of attorney:

FORM OF POWER OF ATTORNEY

THIS GENERAL POWER OF ATTORNEY is given this _____ day of _____ 19____ by AB of _____.

I appoint CD of _____ [or CD of _____ and EF of _____ jointly *or* jointly and severally] to be my attorney[s] in accordance with *The Powers of Attorney Act*.

[In accordance with the said Act I hereby expressly confirm that this power is to be valid notwithstanding any subsequent mental incapacity on my part.] To be included if the power is to survive the donor's incapacity.

IN WITNESS etc.

NOTE: Section of *The Powers of Attorney Act, 1972* provides that where the donor ceases to have legal capacity, this power ceases to be valid and has no effect unless the attorney files a notarial copy of this power in the office of the surrogate court of the county or district in which the donor or the donee resides not later than fifteen days after the donee first learns of the donor's legal incapacity.

By providing for the appointment of joint attorneys, it is not the Commission's intention that the donor must appoint joint attorneys as a condition precedent to the continuing validity of the power. We simply intend to provide for those cases where the donor wishes to appoint more than one attorney. The form which is recommended can be used where there is a single attorney, and also where there is more than one, whether they are to act jointly, or jointly and severally.

PART V

SUMMARY OF THE COMMISSION'S RECOMMENDATIONS

Effect of the Donor's Subsequent Incapacity on a Validly Executed Power of Attorney

The Commission recommends that *The Powers of Attorney Act*, R.S.O. 1970, c. 357 be repealed, and that there be enacted a Powers of Attorney Act which will allow a donor of a power of attorney to provide expressly for the power to survive his subsequent incapacity, subject to the following conditions which should be set out in the new Act:

1. The donor must expressly state in the power of attorney that he intends the power to survive and be valid even if he should subsequently become mentally incapacitated.

2. (a) The power of attorney must be executed in the presence of at least one witness, who shall be someone other than the donee or the spouse of the donee;

   (b) (i) The attorney should be required to file a notarial copy of the power of attorney in the office of the registrar of the surrogate court in the county or district where the donor or the donee resides, not later than fifteen days after the attorney has knowledge that the donor has become incapacitated;

   (ii) The registrar of the surrogate court should be required to transmit a notice of the filing of the power of attorney to the Registrar of the Supreme Court by registered mail;

   (iii) Subject to paragraph iv, if the attorney fails to file a copy of the power of attorney, the power cannot be exercised validly subsequent to the donor's incapacity;

   (iv) If the attorney fails to file a copy of the power of attorney, provision should be made for an application to the surrogate court for an order validating the exercise of the power of attorney in the period subsequent to incapacity notwithstanding the attorney's failure to file, and directing the attorney to file both a copy of the power of attorney and the order in the office of the surrogate court not later than fifteen days after the date of the order;

   (c) Provision should be made for interested parties to apply to the surrogate court for an order that the attorney be directed to pass his accounts;

(d) The Public Trustee should be empowered to apply to the surrogate court on behalf of the interested parties for an order directing the attorney to pass his accounts if a complaint is made to him.

3. (a) Provision should be made for interested parties to apply to the surrogate court to have a person other than the named attorney substituted for the named attorney;

(b) The Public Trustee should be empowered to make an application to the surrogate court on behalf of interested parties for the appointment of a substitute attorney if a request is made to him.

4. Provision should be made for the attorney himself to apply to the surrogate court to have another attorney substituted, on giving notice of his intention to make such an application to the Public Trustee and to all interested parties.

5. The power should continue to be valid only so long as there has been no declaration of mental incompetency. Should an application for such a declaration be made, and approved, and a committee appointed, then, the power should cease to be valid.

6. The donor may revoke the power at any time prior to his becoming incapacitated, and may also revoke the power if and when he recovers from his incapacity.

7. The Powers of Attorney Act should apply in all cases where a donor wishes to provide for the validity of the power during his incapacity, notwithstanding any agreement or waiver to the contrary.

Power of the Court to Appoint an Attorney for Specific Purposes

The Commission recommends that in a proper case, the surrogate court should be empowered, on application, to appoint an attorney to act on behalf of a person who is incapacitated, but who has not executed a power of attorney, for limited and specific purposes, on such terms as may be set out in the order.

Effect of the Donor's Death on a Validly Executed Power of Attorney

The Commission recommends that a power of attorney should cease to be valid on the death of the donor.

The Form of the Power of Attorney

The Commission recommends that the Act include a form of power of attorney which may be used, and that the form shall read as follows:

FORM OF POWER OF ATTORNEY

THIS GENERAL POWER OF ATTORNEY is given this _____ day of _____ 19_____ by AB of _____.

I appoint CD of _____ [or CD of _____ and EF of _____ jointly *or* jointly and severally] to be my attorney[s] in accordance with *The Powers of Attorney Act.*

[In accordance with the said Act I hereby expressly confirm that this power is to be valid notwithstanding any subsequent mental incapacity on my part.] To be included if the power is to survive the donor's incapacity

IN WITNESS etc.

NOTE: Section of *The Powers of Attorney Act, 1972* provides that where the donor ceases to have legal capacity, this power ceases to be valid and has no effect unless the attorney files a notarial copy of this power in the office of the surrogate court of the county or district in which the donor or the donee resides not later than fifteen days after the donee first learns of the donor's legal incapacity.

BILL **1972**

The Powers of Attorney Act, 1972

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Interpretation

1. In this Act,

(*a*) "attorney" means the donee of a power of attorney or where a power of attorney is given to two or more persons, whether jointly or severally or both, means any one or more of such persons;

(*b*) "legal incapacity" means mental infirmity of such a nature so as to render a person incapable of managing his affairs.

PART I

Application of Act

2. Notwithstanding any agreement or waiver to the contrary, this Act applies to a power of attorney that contains a provision referred to in section 3.

Powers of attorney exercisable while donor without capacity

3. Where a power of attorney expressly states that it may be exercised during any subsequent legal incapacity of the donor, such provision is valid and effectual, subject to such conditions and restrictions, if any, as are contained therein and not inconsistent with this Act.

Revocable

4. A power of attorney referred to in section 3 may be revoked by the donor at any time while he has legal capacity.

Execution

5. A power of attorney that contains a provision referred to in section 3 shall be executed in the presence of a witness who is not the attorney or the attorney's spouse.

Filing of power of attorney

6.—(1) Where the donor of a power of attorney that contains a provision referred to in section 3 subsequently is without legal capacity, the attorney may at any time, and shall, not later than fifteen days after he first learns of the incapacity, file a notarial copy of the power of attorney in the office of the registrar of the surrogate court of the county or district in which the donor or donee resides.

Notice to Registrar of the Supreme Court of filing

(2) Notice of every filing of a power of attorney shall be transmitted by the registrar of the surrogate court by registered mail to the Registrar of the Supreme Court forthwith after the filing.

Effect of failure to file

(3) Subject to subsections 4 and 5, a power of attorney that is not filed in accordance with subsection 1 ceases to be valid and has no effect.

Extension of time for filing

(4) The attorney may apply to a judge of the surrogate court of the county or district in which the power of attorney is required to be filed for an order extending the time for filing the power of attorney and the judge, upon being satisfied that the uses, if any, made of the power by the attorney during the legal incapacity of the donor have been proper, may extend the time for filing the power of attorney to a date not more than fifteen days after the date of the order and the order or a certified copy thereof shall be filed with the power of attorney.

Exception to invalidity

(5) Where a power of attorney has become invalid under this section and a person, without knowing or having reasonable grounds for believing that the donor is without legal capacity, deals with the attorney, the transaction between them shall, in favour of that person, be as valid as if the power had then been in existence.

Passing accounts

7.—(1) Where a power of attorney contains a provision referred to in section 3 and the donor subsequently is without legal capacity, any person having a material interest, directly or indirectly, in the estate of the donor may, during such incapacity, apply to the surrogate court in the office of which the power of attorney is filed for an order requiring the attorney to pass his accounts for transactions involving an exercise of the power during the incapacity of the donor, and the court may order the attorney to pass such accounts or such part thereof as is provided in the order.

Procedure and effect

(2) Where an order is made under subsection 1, the attorney shall file his accounts in the office of the surrogate court and the proceedings and practice upon the passing of the accounts shall be the same and of the like effect as the passing of executors' or administrators' accounts in the surrogate court.

Application by Public Trustee

(3) The Public Trustee may apply under subsection 1 in the same manner as a person materially interested in the estate of the donor where it appears to him desirable to do so in the best interests of the donor or his estate.

Substitution of attorney

8.—(1) Where a power of attorney contains a provision referred to in section 3 and the donor subsequently is without legal capacity, any person having a material interest, directly or indirectly, in the estate of the donor, may during such incapacity, apply to the surrogate court in the office of which a notarial copy of the power of attorney is or ought to be filed for an order substituting another person for the attorney named in the power of attorney and the court may make the order or such other order as the court considers proper.

Effect of substitution

(2) The substitution of another person for an attorney under subsection 1 shall have the like effect as the substitution of another person for a trustee under *The Trustee Act*. R.S.O. 1970, c. 470

Application by Public Trustee

(3) The Public Trustee may apply under subsection 1 in the same manner as a person materially interested in the estate of the donor where it appears to him desirable to do so in the best interests of the donor or his estate.

Application by attorney

(4) The attorney may apply under subsection 1 in the same manner as a person materially interested in the estate of the donor, on giving notice to the Public Trustee and to all persons having a material interest.

Effect of declaration of mental incompetency

9. A power of attorney that contains a provision referred to in section 3 becomes invalid and of no effect, notwithstanding such provision, where an order has been made declaring the donor a mentally incompetent person and upon the appointment of a committee.

Appointment of attorney by court

10. Where a person ceases to have legal capacity and has no attorney with the powers referred to in section 3, the surrogate court of the county or district in which he resides may, upon the application of any person who has a material interest, directly or indirectly, in the estate of such person and upon being satisfied that to do so is in the best interests of the person who is without capacity or his estate, appoint a person and vest him with the power of attorney for such limited purposes and upon such conditions as are set out in the order.

Form of power of attorney

11.—(1) A power of attorney in Form 1 confers,

(*a*) on the donee of the power; or

(*b*) where there is more than one donee, on the donees acting jointly or acting jointly and severally, as the case may be,

authority to do on behalf of the donor anything that the donor can lawfully do by an attorney.

(2) A power of attorney in Form 1 which contains the express statement that it may be exercised during any subsequent legal incapacity of the donor, shall be deemed to be a power of attorney referred to in section 3.

PART II

Validity of acts or payments *bona fide* after decease or revocation

12.—(1) Every payment made and every act done under and in pursuance of a power of attorney, or a power, whether in writing or oral, and whether expressly or impliedly given, or an agency expressly or impliedly created, after the death of the person who gave such power or created such agency, or after he has done some act to avoid the power or agency, are notwithstanding such death or act, valid as respects every person who is a party to such payment or act, to whom the fact of the death, or of the doing of such act, was not known at the time of such payment or act *bona fide* made or done, and as respects all claiming under such last-mentioned person.

(2) Nothing in this section affects the right of any person entitled to the money against the person to whom the payment is made, and the person so entitled has the same remedy against the person to whom the payment is made as he would have had against the person making the payment.

R.S.O. 1970, c. 375, repealed

13.—(1) *The Powers of Attorney Act* is repealed.

Exception

(2) Notwithstanding subsection 1, *The Powers of Attorney Act* continues to apply in respect of powers of attorney executed before this Act comes into force.

Commencement

14. This Act comes into force on the day it receives Royal Assent.

Short title

15. This Act may be cited as *The Powers of Attorney Act, 1972*.

FORM OF POWER OF ATTORNEY

THIS GENERAL POWER OF ATTORNEY is given this _____day of_____19_____by AB of_____.

I appoint CD of_____[or CD of_____and EF of_____ jointly *or* jointly and severally] to be my attorney[s] in accordance with *The Powers of Attorney Act*.

[In accordance with the said Act I hereby expressly confirm that this power is to be valid notwithstanding any subsequent mental incapacity on my part.] To be included if the power is to survive the donor's incapacity

IN WITNESS etc.

NOTE: Section of *The Powers of Attorney Act, 1972* provides that where the donor ceases to have legal capacity, this power ceases to be valid and has no effect unless the attorney files a notarial copy of this power in the office of the surrogate court of the county or district in which the donor or the donee resides not later than fifteen days after the donee first learns of the donor's legal incapacity.

PART VII

CONCLUSION

We wish to acknowledge, and express our appreciation to all those who have assisted us in our study. We particularly recognize and offer thanks to Miss Maureen J. Sabia, one of our research officers, on whom fell the main burden of the research and initial drafting of this report. We are indebted to Arthur N. Stone, Esq., Q.C., Associate Legislative Counsel, for his most competent assistance in drafting the proposed bill. We are also grateful to the banks and trust companies operating in Ontario who so readily gave us the benefit of their views.

One of the Commission's responsibilities is to recommend the clarification of those areas of the law which are uncertain and therefore cause concern. The question of the validity of powers of attorney subsequent to mental incapacity is one of those areas. We are convinced that our recommendations will not only render certainty to the law, but also provide a much needed practical reform.

All of which is respectfully submitted.

H. ALLAN LEAL,
Chairman

JAMES C. McRUER,
Commissioner

RICHARD A. BELL,
Commissioner

W. GIBSON GRAY,
Commissioner

WILLIAM R. POOLE,
Commissioner

January 11, 1972.